

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No. 146/2004**

% **24th April, 2012**

SHRI RAM MURTI SINGH SISODIA Appellant
Through: Ms. Kamlakshi Singh, Advocate.

versus

SHRI PRATAP SINGH SISODIA & ORS. Respondents
Through: Mr. J.P. Verma, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 10.2.2004 dismissing the suit for partition filed by the appellant/plaintiff. The suit for partition has been dismissed on two counts. The first count is that the appellant/plaintiff has not paid the appropriate Court fees as the suit is valued at ₹ 10 lacs and Court fees of only ₹50 has been filed. The second count on which the suit has been dismissed is that a power of attorney executed by the original owner in favour of the parties to the suit does not confer any ownership rights.

2. The facts of the case are that four parties to the suit i.e. one plaintiff/appellant and the three defendants/respondents, are brothers and who purchased rights in the suit property being plot No.C-155, Bhagat Singh Colony, New Usmanpur, Delhi-53 from Ms. Bimla Devi vide a registered general power of attorney dated 15.10.1973. It was pleaded by the appellant/plaintiff that he had another property and therefore on his behalf his brother-in-law (sala), Sh. Devendra Singh Chauhan was staying in the suit property and when he left, the defendants started creating problems forcing him to send a legal notice dated 26.5.1997 which was followed up by another legal notice dated 14.12.2001 demanding his share in the suit property. As the defendants refused to partition the suit property, the subject suit came to be filed.

3. Out of the three defendants, defendant No.3 supported the appellant/plaintiff. Defendant Nos.1 and 2 contested the suit and pleaded that the power of attorney did not create any rights in the suit property. It was further pleaded that the suit was liable to be dismissed as the appropriate Court fee on the valued amount of ₹ 10 lacs was not paid. The right of the appellant/plaintiff in the suit property was denied. It was pleaded that the suit was barred by limitation.

4. After completion of pleadings, the trial Court framed the following issues:-

“1. Whether the plaintiff is entitled to get share in property No.C-155, Bhagat Singh Colony, New Usmanpur, Delhi-53, if so, to what effect?

2. Relief.”

5. Trial Court has dismissed the suit by making the following observations:-

“11. This issue is whether the plaintiff is entitled to get share in property No.C-155, Bhagat Singh Colony, New Usmanpur, Delhi-53, if so, to what effect. The onus to prove this issue is upon the plaintiff. The present suit has been filed on 8.4.02. The case of defendants is that suit is time barred. The plea is that plaintiff is alleged to have sent legal notice dated 26.5.87 and on taking the cause of action have been arises on this date, the suit is time barred. However, I am of the considered view that in case of partition the right of partition is of recurring nature and if the period of limitation is considered from the legal notice dated 14.12.2001, the suit is within limitation. Accordingly, the plea of defendants 1 and 2 about the suit being time barred is devoid of any merits and is dismissed.

12. The suit property is deposed to have been purchased vide Power of Attorney Ex.PW1/A. This power of attorney is not original power of attorney. The original power of attorney has not been filed on record. No other document about the alleged purchase of the property has been filed on the record. I am of the considered view that power of attorney does not confer any right of ownership on the parties. Further the original power of attorney has not been filed on record. Thus, power of attorney is not proved on record. The case of the plaintiff is that original power of attorney is with defendants no.1 and 2 and in particular with defendant no.1. No notice under order 12 rule 8 CPC has been issued by plaintiff to defendants to produce the original power of

attorney. It is concluded that ownership in the suit property i.e. C-155, Bhagat Singh Colony, New Usmanpur, Delhi-53 of plaintiff and defendants is not proved on record. Accordingly, the plaintiff is not entitled to claim through court, share in the suit property i.e. C-155, Bhagat Singh Colony, New Usmanpur, Delhi-53.

13. It is worth nothing in this case that DW5 Smt. Om Wati and DW-6 Smt. Krishna Chauhan, sisters of parties whom I consider to be independent witnesses, have deposed and it is proved from their evidence that plaintiff did not contribute anything towards purchase and construction of the suit property. In other words, plaintiff is not entitled to get share in the suit property. Issue no.1 is decided accordingly.

ISSUE NO.2

14. Issue no.2 is relief. In view of decision on issue no.1 the suit of the plaintiff is liable to be dismissed. It is worth nothing that in para 20 of the plaint it is mentioned that the subject matter of the suit is valued for the purpose of jurisdiction and court fee at ₹ 10 lacs. However, court fee of ₹ 50/- only has been affixed on the plaint. It is an admitted case of plaintiff that at the time of filing of the suit he was not in possession of any portion of the suit property. Thus, he was liable to pay the court fees on the valuation of the suit at ₹10 lacs. He is liable to pay court fees on this amount, after deducting the amount of court fees already paid by him.

15. In view of the above discussions, the suit of the plaintiff is dismissed with costs. A copy of this judgment be sent to Commissioner (Revenue) for recovery of the remaining court fees from the plaintiff. Decree sheet be prepared accordingly. File be consigned to Record Room.”

6. In my opinion, the trial Court has committed an illegality in dismissing the suit on the ground that adequate Court fee was not paid and the power of attorney does not confer any rights in the property. Firstly, in a suit for partition no Court fee is payable inasmuch as possession of one

co-owner is in law possession on behalf of all the co-owners and in this case the co-owners were brothers and no ouster has at all been proved by the respondent Nos.1 and 2/defendant Nos.1 and 2. Since the appellant/plaintiff therefore is deemed to be in possession as a co-owner only the fixed court fee of ₹ 20/- is payable under Schedule-II Article 17(vi) of the Court fees Act, 1870. Therefore, the Court fee paid of ₹ 50/- is sufficient. Actually, in a suit for partition when a final decree for partition is passed, (and the decree for partition is an instrument as defined in Section 2(15) of Indian Stamp Act, 1899) it is at that stage only that the final decree for partition will have to be engrossed on a non-judicial stamp paper. I therefore hold that the trial Court did not arrive at a correct finding in holding that the suit was liable to be dismissed as inadequate Court fee was paid.

7. So far as the finding of the trial Court that the power of attorney does not confer rights, I have had an occasion to deal with this aspect in the judgment in the case of ***Sh. Ramesh Chand Vs. Suresh Chand & Anr.*** in RFA No.358/2000 decided on 9.4.2012 and in which after making reference to the relevant paras of the judgment of the Supreme Court in the case of ***Suraj Lamps & Industries Pvt. Ltd. Vs. State of Haryana and Anr. 183 (2011) DLT 1 (SC)***, I have observed as under:-

“2. Before I proceed to dispose of the appeal, and which would turn substantially on the judgment in the case of *Suraj Lamps & Industries Pvt. Ltd. (supra)*, it is necessary to reproduce certain paras of this judgment of the Supreme Court, and which paras are paras 12, 13, 14 and 16, and which read as under:-

“12. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections [54](#) and [55](#) of Transfer of Property Act and will not confer any title nor transfer any interest in an immovable property (**except to the limited right granted under Section [53A](#) of Transfer of Property Act**). According to Transfer of Property Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section [54](#) of Transfer of Property Act enacts that sale of immoveable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.

Scope of Power of Attorney

13. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see Section [1A](#) and Section [2](#) of the Powers of Attorney Act, 1882). It is revocable or terminable at any time **unless it is made irrevocable in a manner known to law**. Even an irrevocable attorney does not have the effect of transferring title to the grantee. In State of Rajasthan v. Basant Nehata [MANU/SC/0547/2005](#) : 2005 (12) SCC 77 this Court held:

“A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favor of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A

power of attorney is, as is well known, a document of convenience.

Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. **Except in cases where power of attorney is coupled with interest**, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee.”

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor.

Scope of Will

14. A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer inter vivos. The two essential characteristics of a will are that it is intended to come into effect only after the death of the testator and is revocable at any time during the life time of the testator. It is said that so long as the testator is alive, a will is not worth the paper on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the will, by operation of law, the will stands revoked. (see Sections [69](#) and [70](#) of Indian Succession Act, 1925). Registration of a will does not make it any more effective.

16. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of 'GPA sales' or 'SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest

in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of Section 53A of the Transfer of Property Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales.” (emphasis added)

3. A reference to the aforesaid paras shows that unless there is a proper registered sale deed, title of an immovable property does not pass. The Supreme Court has however reiterated that rights which are created pursuant to Section 53A of the Transfer of Property Act, 1882 dealing with the doctrine of *part performance* (para 12), an irrevocable right of a person holding a power of attorney given for consideration coupled with interest as per Section 202 of the Contract Act, 1872 (para 13) and devolution of interest pursuant to a Will (para 14). Therefore, no doubt, a person strictly may not have complete ownership rights unless there is a duly registered sale deed, however, certain rights can exist in an immovable property pursuant to the provisions of Section 53A of the Transfer of Property Act, 1882, Section 202 of the Contract Act, 1872. There also takes place devolution of interest after the death of the testator in terms of a Will.

4. There is also one other aspect which needs to be clarified before proceeding ahead and which is whether a power of attorney given for consideration would stand extinguished on the death of the executant of the power of attorney. The answer to this is contained in illustration given to Section 202 of the Contract Act, 1872, and the said provision with its illustration reads as under:-

“Section 202. Termination of agency, where agent has an interest in subject matter.- Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Illustrations

(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death."

The object of giving validity to a power of attorney given for consideration even after death of the executants is to ensure that entitlement under such power of attorney remains because the same is not a regular or a routine power of attorney but the same had elements of a commercial transaction which cannot be allowed to be frustrated on account of death of the executant of the power of attorney."

8. In the present case, the parties may not, strictly speaking, have become co-owners by means of the power of attorney, Ex.PW1/A, however, rights in the property are created by virtue of Section 202 of the Contract Act, 1872. In fact, in my opinion, the parties would have now become owners of the property by virtue of Section 27 of the Limitation Act, 1963 which states that on expiry of period of 12 years for filing of a suit for recovery of an immovable property, the claim in the suit property of the person who claims to be the owner, stands extinguished i.e. a person in actual physical possession becomes the owner of the suit property. In this case, Smt. Bimla Devi transferred rights in the suit property by virtue of the power of attorney dated 15.10.1973 Ex.PW1/A and the suit was filed

in the year 2002 i.e. more than 12 years after execution of power of attorney. Smt. Bimla Devi till date has not claimed rights in the suit property and therefore the parties to the suit being four brothers became co-owners of the suit property by virtue of law of prescription contained in Section 27 of the Limitation Act, 1963.

9. The finding of Trial Court that the power of attorney Ex.PW1/A is not validly proved and therefore appellant/plaintiff cannot claim ownership rights, is an incorrect finding because in the written statement and depositions of DW1 & DW2 it is not denied that property stands jointly in the name of the parties. In fact this is also so in the house-tax records and which aspect has been proved vide house tax record, Ex.PW1/C. Further, so far as the proof of power of attorney is concerned, it may be noted that before the commencement of cross-examination, the respondents/defendants did not object to the exhibition of this document, and therefore, in view of the decision of the Supreme Court in the case of ***R.V.E.Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P.Temple 2003 (8) SCC 752***, the respondents/defendants are estopped from objecting to the proof of the document. In the present case, evidence was filed by way of affidavit and therefore since objection to the exhibiting/proof was not taken before commencement of the cross-

examination, the objection is deemed to have been waived. It is therefore held that appellant/plaintiff was a co-owner, entitled to partition.

10. In view of the above, the appeal is accepted. Impugned judgment dated 10.2.2004 is set aside. The suit of the plaintiff for partition will stand decreed and it is held that the plaintiff will be entitled to 1/4th share in the suit property being plot No.C-155, Bhagat Singh Colony, New Usmanpur, Delhi-53. Each of the defendants/respondents will also be entitled to 1/4th share in the suit property. A preliminary decree is accordingly passed holding each of the parties to the suit as 1/4th co-owner. Parties are left to bear their own costs. Decree sheet be prepared.

11. Now, final decree proceedings have to take place in accordance with law before the trial Court. Let the parties appear before the District & Sessions Judge, Delhi on 23rd May, 2012, and on which date the District & Sessions Judge will mark the suit for passing of a final decree in accordance with law to a competent Court. Parties are left to bear their own costs. Trial Court record be sent back so as to be available to the District & Sessions Judge, Delhi on the date fixed.

VALMIKI J. MEHTA, J.

APRIL 24, 2012

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